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WHEN CRIMINAL AND TORT LAW INCENTIVES RUN INTO TIGHT BUDGETS AND REGULATORY DISCRETION

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Eight-year-old Greyson Yoe was electrocuted while waiting to get on the "Scooters" bumper car ride at the Lake County Fair in northeastern Ohio. The failure to ground the ride structure and damage to a light fixture on the ride caused his death. The day before the electrocution, two inspectors from the Ohio Department of Agriculture (ODA) inspected the ride and passed it as "safe to operate." That inspection was superficial and grossly inadequate, and the completed inspection form had serious misrepresentations. Indeed, the inspectors later admitted that they never reviewed the key electrical items that they checked off on the inspection form. The post-electrocution review not only showed that the electrical system had gross safety problems but also that the ride's management and operators knew of and ignored these problems.

This Article is not about the electrocution; it is not about the botched inspection; nor is it about the ignored problems. The lay press covered those well. Instead, this Article is about the response of the responsible authority, the ODA, to the civil and criminal actions brought or promised against it and its employees. The ODA appears to have chosen to protect itself and its employees by getting out of the business of protecting the public from similar electrical hazards. Such actions, under a prominent theory regarding the foundations of tort and criminal law, are predictable and unsurprising. Further, the ODA's acts should call into question certain assumptions about the incentives created by criminal and tort law.

Traditional tort and criminal law jurisprudence assume that the potential for, and reality of, civil or criminal liability changes behavior.[1] In

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particular, many scholars contend that liability makes the injuries or harms caused by a violation of tort or criminal law standards less likely to occur in the future by way of what is sometimes called "specific deterrence" in the case of the individual defendant or "general deterrence" in the case of others.[2]

This Article explores one instance of what may be a broader problem for such deterrence theory: a defendant who controls the standards by which it is judged, in an age of tight budgets and financial pressures, where government is expected to operate "like a business." In that scenario, incentives can combine to make the situation post-litigation *more* dangerous rather than *less* dangerous.

This Article has four parts. First, I describe the particular factual scenario involving the electrocution of Greyson Yoe. I briefly explore the actions and omissions that led to his electrocution, and then turn to the criminal and civil litigation that followed. I also describe in detail the response of regulators to that litigation—a response that surprised many observers. In the second part, I discuss what response would ordinarily be expected from that sort of criminal and civil litigation. In the third part, I compare the expected response to what ensued and explore three interrelated reasons why the regulators may have reacted the way that they did, and why such a reaction, in retrospect, is unsurprising. In the final part, I discuss how those reasons might affect similar situations in the future and I offer some potential solutions. I also discuss why this problem—involving public actors—is particularly troubling as compared to some otherwise similar situations involving private actors.

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[1] *See, e.g.*, Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst when Doing Its Best*, 91 GEO. L.J. 949, 956–69 (2003); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1318–20 (1993).

[2] *E.g.*, Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 425 (1999); Rustad & Koenig, *supra* note 1, at 1319.

I. THE ELECTROCUTION OF GREYSON YOE, THE LITIGATION THAT FOLLOWED, AND THE RESPONSE

On August 13, 2003, eight-year-old Greyson Yoe, a healthy young boy, went with his father to the Lake County Fair in northeastern Ohio.[3] He asked to ride the bumper cars, known as the "Scooters."[4] While standing in line, watching other riders, he leaned on the ride's metal railing and suffered a severe electrical shock.[5] His feet were on the ground and his body acted as a path for the electrical current to the ground. He cried out, "Help me," and collapsed.[6] He was immediately given CPR[7] but died after several weeks in intensive care.[8]

Yoe's death, which resulted directly from a combination of a failure to ground the ride's structure[9] and an electrical fault caused by a damaged light fixture,[10] should not have surprised any of a number of people:

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[3] Statement of Audra J. Yoe to Lake County Sheriff's Dep't (Aug. 15, 2003) (on file with author); Statement of William S. Yoe Jr. to Lake County Sheriff's Dep't (Aug. 16, 2003) (on file with author).

[4] *See* William S. Yoe Jr., *supra* note 3.

[5] Maggi Martin, *Electrocuted Boy's Family Settles*, PLAIN DEALER (Cleveland), Jan. 25, 2005, at B2; Statement of Elizabeth M. Kaplowitz to Lake County Sheriff's Dep't (Aug. 19, 2003) (on file with author).

[6] Kaplowitz, *supra* note 5.

[7] Audra J. Yoe, *supra* note 3.

[8] *See* State v. Turner, No. 04 CR 000025, slip op. at 1 (Ohio Ct. Com. Pl. Lake County June 28, 2004) (on file with author).

[9] Contemporary 120-volt electrical equipment has three wires: black (high voltage), white (neutral), and green (ground). *See* THE COMPLETE GUIDE TO HOME WIRING: A COMPREHENSIVE MANUAL, FROM BASIC REPAIRS TO ADVANCED PROJECTS 14 (Cowles Creative Publ'g ed., 1998) [hereinafter GUIDE TO HOME WIRING]. (240-volt devices have four wires, but the extra one is unimportant in this discussion.) The white and green wires are solidly grounded at the transformer. *See id.* at 16. The green wire is also connected to exposed metal in the system (including, for example, the metal railing around the Scooters ride). *See id.* at 16 fig. Electrical current is supposed to run through the black wire, through the load (e.g., the transformer used to power the bumper cars with DC power), and then through the white wire. *Id.* When there is an insulation failure, current can create dangerous voltage on exposed metal. *See id.* at 16; BOB DRIES, MANUAL OF ELECTRICAL CONTRACTING 16 (1983). If the metal is properly grounded through the green wire, the ground fault current will be shunted back to the solid ground, but only if the green wire is attached to the solid ground, whether a rod driven into the ground, the electric company's earth ground, or otherwise. *See* GUIDE TO HOME WIRING, *supra*, at 16.

Grounding will not protect a person who touches a live wire, though a ground fault circuit interrupter unit (required in new kitchen, bath, garage, and exterior construction)

(*continued*)

- The fair board did not obtain an electrical permit for connecting the ride to a utility pole; had such a permit been obtained, a licensed electrician would have inspected the hook-up and likely observed and corrected the lack of grounding and other electrical problems.[11]
- The electrician who connected the ride (an eighty-year-old former lineman for an Ohio electrical company)[12] left the ride's grounding wire dangling at the pole, unattached.[13] He made no effort to confirm that the ride was otherwise grounded, stating that he assumed it had a grounding rod elsewhere.[14]
- The ride owner knew about the damaged light fixture[15] but made no effort to repair it and failed to inform ride inspectors of the loose wire in the fixture.[16]

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may do so. Do It Yourself.Com, The GFCI, http://doityourself.com/electric/gfci.htm (last visited Mar. 12, 2006); *see generally* Mike Holt, Grounding v. Bonding Part 1 of 12 (Jan. 12, 2005), http://ecmweb.com/mag/electric_grounding_vs_bonding (providing information about proper grounding safety). Grounding will, however, often prevent injuries of the sort that resulted in Greyson Yoe's death, and it is apparently undisputed that proper grounding would have prevented his death. *See* State v. Rock, Lake App. No. 2004-L-127, 2005-Ohio-6285, 2005 Ohio App. LEXIS 5668, ¶ 20.

[10] *Rock*, 2005-Ohio-6285, 2005 Ohio App. LEXIS 5668, ¶¶ 14, 16, 20.

[11] Letter from Leonard Cavalier, former Chief Inspector, Div. of Amusement Ride Safety, Ohio Dep't of Agric., to Donald S. Varian, Jr., Attorney at Law (Oct. 6, 2004) (on file with author). Mr. Cavalier was hired by one ride inspector's attorney to evaluate the work performed by the inspectors, and his report was presented as part of the inspector's sentencing memorandum. Defendant's Sentencing Memorandum, State v. Turner, No. 04 CR 000025 (Ohio Ct. Com. Pl. Lake County Jan. 18, 2005) (on file with author).

[12] Maggi Martin, *Fair Worker Didn't Follow Wiring Rules, Expert Says*, PLAIN DEALER (Cleveland), June 4, 2004, at B3.

[13] *See Rock*, 2005-Ohio-6285, 2005 Ohio App. LEXIS 5668, ¶ 10.

[14] Transcript of Proceedings Volume I of VI at 1023, State v. Rock, No. 04 CR 000027 (Ohio Ct. Com. Pl. Lake County June 15, 2004) (on file with author). Rock testified that he "folded" the green wire around so that it would not short, *id.* at 993, that he did not confirm grounding, and that he "assumed that it was grounded." *Id.* at 1023.

[15] Letter from William A. Hopper, Jr., Chief Legal Counsel, Ohio Dep't of Agric., to author attachment 35 (Feb. 8, 2005) (on file with author) (photographs of loose wire).

[16] Cavalier, *supra* note 11 (stating that the ride owner failed to disclose the loose wire to the inspectors); Letter from Ralph Dolence, Dolence Elec. Technical Consultants, Inc., to Ron Walters, Lieutenant, Lake County Sheriff's Dep't (Aug. 28, 2003), *available at* http://www.masstort.org/Downloads/ODA/ODA114-119.pdf ("The ride owner stated that

(*continued*)

- Ride operators and their supervisors ignored or belittled the complaints of patrons who reported feeling shocks both earlier during the 2003 fair and the year prior.[17]
- Ride operators and their supervisors also apparently disregarded the ride's electrical system's regular failures throughout the 2003 fair. Instead, among other things, fuses were bypassed with aluminum foil, and ride operators would simply reset circuit breakers and continue operation.[18]

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during the setup of the ride the lighting cord got caught in the mechanism and was torn out of the weather tite work box and was never repaired.").

[17] *See, e.g.*, Statement of Michelle M. Bicker to Lake County Sheriff's Dep't (n.d.) (on file with author) (stating that she was shocked when touching the Scooter railing and that when she told a ride operator he responded that "there's nothing wrong [and] theres [sic] not [enough] voltage there to hurt anyone anyway"); Statement of Richard Doles to Lake County Sheriff's Dep't (Aug. 14, 2003) (on file with author) (reporting on a similar incident at the 2002 Lake County Fair, in which his eight-year-old son described being shocked for a few seconds).

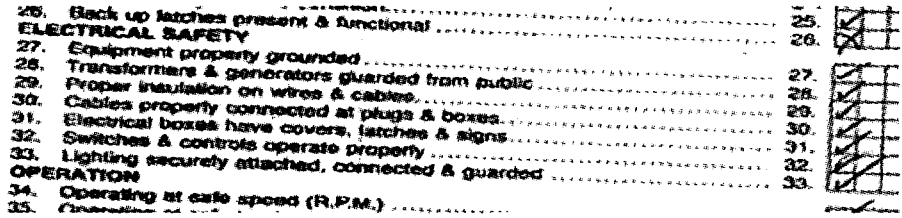
The electrician, Nicholas Rock, said that he had been connecting the rides at the fair for over forty years, Statement of Nicholas J. Rock, Lake County Fair Bd. Dir., to Lake County Sheriff's Dep't (Aug. 14, 2003), *available at* http://www.masstort.org/ODA/ODA333.pdf, and so it seems likely that he did not ground the ride in 2002 either.

The same company, Amusements of Buffalo, that provided the Scooters ride for the 2003 Lake County Fair, *Rock*, 2005-Ohio-6285, 2005 Ohio App. LEXIS 5668, ¶ 5, also provided the ride in 2002. *See* Amusements of Buffalo, Inc., Ride Maintenance Log (2002) (on file with author). It appears, however, that the serial numbers of the bumper car rides differed each of those two years. The ODA inspectors checked "Equipment properly grounded" as "satisfactory" in 2002, just as they had in 2003. *See* Theodore Brubaker & Kalin N. Turner, Amusement Ride Safety Division, Ohio Department of Agriculture, Ride Inspection Form (Aug. 12, 2003), *available at* http://www.masstort.org/Downloads/ODA/ODA362.pdf; Unknown Inspector, Amusement Ride Safety Division, Ohio Department of Agriculture, Ride Inspector Form (Aug. 12, 2002) (on file with author) (inspector's name illegible).

[18] *See* Hopper, Jr., *supra* note 15, attachment 3 (showing photographs of the control panels taken shortly after the accident where fuses were bypassed by wrapping with aluminum foil); Statement of David A. Storms to Lake County Sheriff's Dep't (Aug. 19, 2003) (on file with author) (describing witnessing the ride operator resetting circuit breakers and reporting his statement that the ride "had been popping the breakers all afternoon but they couldn't find a problem").

In sum, the ride was in a shambles, with problems far beyond the specific electrical issues that led to the electrocution.[19]

Most interesting, the ride had been inspected the day prior to the accident.[20] The inspectors, who were ODA employees, specifically indicated on the inspection form (reproduced in part below) that the electrical system, including grounding, was "satisfactory"; in fact, the ride structure was not grounded, and the inspectors had made *no* effort to evaluate its grounding, nor, it appears, any aspect of the electrical equipment:[21]



As suggested above, there is plenty of blame to go around in connection with the death of Greyson Yoe, and much has already been allocated. The electrician and the ride owner were prosecuted criminally.[22] The electrician was found guilty of reckless homicide and involuntary manslaughter in a jury trial[23] and the ride owner pled guilty to attempted

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[19] *See* Dolence, *supra* note 16.

[20] *See* Brubaker & Turner, *supra* note 17; *see also* State v. Turner, No. 04 CR 000025, slip op. at 3 (Ohio Ct. Com. Pl. Lake County June 28, 2004) (on file with author).

[21] Brubaker & Turner, *supra* note 17; *see* Cavalier, *supra* note 11. The inspectors have argued that the form was deficient because it required essentially a "yes" or "no" answer in connection with checking grounding, and that they were unqualified to evaluate electrical matters. *See* Defendant's Sentencing Memorandum, *supra* note 11. On the very form in question, however, the inspectors wrote "did not observe" on other subjects. Brubaker & Turner, *supra* note 17. Additionally, to be clear, there is no indication that the inspectors in fact saw anything that suggested the ride was grounded. To the contrary, there was no grounding rod or any other evidence of grounding. Dolence, *supra* note 16. Further, the inspectors did not even ask to confirm with the person who made the connection to the utility pole that the green grounding wire was attached to the power company's ground. *See* Defendant's Sentencing Memorandum, *supra* note 11.

[22] Maggi Martin, *Electrician Gets Jail in Death of Boy, 8*, PLAIN DEALER (Cleveland), July 8, 2004, at B1.

[23] State v. Rock, Lake App. No. 2005-L-005, 2005-Ohio-6291, 2005 Ohio App. LEXIS 5632, ¶¶ 2, 6; Martin, *supra* note 22. The electrician was sentenced to thirty days in jail; his

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involuntary manslaughter.[24] The inspectors, too, were prosecuted, and ultimately pled no contest to a lesser charge of dereliction of duty, having been charged with various forms of homicide.[25]

Civilly, Greyson's parents sued the county fair's board and the owner of the ride (which together settled for a total of nearly $2 million), and have publicly said that they will pursue suits against the state and the inspectors.[26] As of this writing, those civil suits have not been filed.

That leaves, of course, the ODA itself. In a move that surprised many and attracted the attention of editorial writers, after the prosecutions were completed, the ODA removed the grounding section from the inspection form entirely.[27] At the same time, the ODA added a notice to ride owners reminding them that the ride owner is responsible for abiding by all relevant codes, standards, and rules, including those relating to electrical grounding.[28]

With ODA's decision to remove the grounding section from the form, Ohio ride inspectors will continue to inspect the rides, but will have no obligation to determine whether the rides are grounded.[29] That obligation

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involuntary manslaughter conviction was reversed but the sentence stood on the remaining conviction. *Rock*, 2005-Ohio-6291, 2005 Ohio App. LEXIS 5632, ¶ 6; State v. Rock, Lake App. No. 2004-L-127, 2005-Ohio-6285, 2005 Ohio App. LEXIS 5668; Martin, *supra* note 22.

[24] Maggi Martin, *Ride Owner Gets Jail for Fair Death*, PLAIN DEALER (Cleveland), July 13, 2004, at B3. The ride owner was sentenced to six months in jail. *Id.*

[25] *See* Written Plea of No Contest and Judgment Entry, State v. Turner, No. 04 CR 000025 (Ohio Ct. Com. Pl. Lake County Nov. 4, 2004) (on file with author); Written Plea of No Contest and Judgment Entry, State v. Brubaker, No. 04 CR 000026 (Ohio Ct. Com. Pl. Lake County Oct. 15, 2004) (on file with author). Both inspectors were sentenced to fifteen days in jail. *Last Defendant Sentenced*, PLAIN DEALER (Cleveland), Jan. 11, 2005, at B3.

[26] Martin, *supra* note 5.

[27] Maggi Martin, *Ohio Won't Test Rides for Proper Grounding*, PLAIN DEALER (Cleveland), Jan. 20, 2005, at B1; *see, e.g.*, Lindsey Dodson, Amusement Ride Safety Division, Ohio Department of Agriculture, Ride Inspection Form (Aug. 17, 2004), *available at* http://www.masstort.org/Downloads/ODA/ODA355-360.pdf; *see also* Editorial, *A Fair Chance at Safety*, PLAIN DEALER (Cleveland), Jan. 25, 2005, at B8.

[28] *See* Dodson, *supra* note 27.

[29] The ODA has stated that "electrical inspections were not changed or weakened after Greyson's death" and that the "forms were edited because they were 'vague and open to misinterpretation.'" Maggi Martin, *Protecting Kids in Greyson's Name*, PLAIN DEALER (Cleveland), Feb. 15, 2005, at B1 (quoting Mark Anthony, spokesman for the Ohio Department of Agriculture). While there is likely no perfect test for grounding, at least

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is left in the hands of the ride owners,[30] most of whom are presumably conscientious, but some of whom may be like the ride owner here, who readily admitted that he ignored a damaged light fixture, which resulted in a live wire contacting the ride's metal frame.[31]

II. WHAT RESPONSE SHOULD WE HAVE EXPECTED?

Traditional notions of tort and criminal law suggest that the criminal prosecutions and civil suits in this case should have had a different result—*tighter* rather than *looser* regulations, or at least better enforcement of the regulations that existed. An intuitive response to punishment for particular conduct—or, in the civil tort context, to the requirements to reimburse another party for damages caused—is to help ensure that such conduct does not occur in the future, either by others ("general deterrence") or by this particular wrongdoer or tortfeasor ("specific deterrence").[32] In the context of the Yoe case, we would expect the ODA to take action to ensure that its inspectors did in fact check rides' grounding and that its inspectors had the appropriate training and equipment to do so.

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some experts state that checking grounding is quite feasible for state inspectors and that such efforts would be relatively inexpensive. *See* Martin, *supra* note 27. Further, it seems evident that even an untrained inspector could at least determine if a grounding rod was present and, if not, inquire about whether the ground wire was attached at the pole. While such an approach would not necessarily catch all flawed grounding attempts, it would catch those situations in which no attempt at grounding at all occurred—the situation that killed Greyson Yoe.

[30] *See* State v. Rock, Lake App. No. 2004-L-127, 2005-Ohio-6285, 2005 Ohio App. LEXIS 5668, ¶ 63.

[31] *See supra* note 16 and accompanying text. Cleveland's *The Plain Dealer* characterized the ODA's move as "akin to giving the fox the hen house key and a permit to sell chicken suppers." *A Fair Chance at Safety*, *supra* note 27. Economically rational ride owners would be expected to do the necessary tests, but the existence of a regulatory and inspection system in the first place suggests that perhaps the owners do not act as conscientiously as Ohio's legislature would like. The Ohio legislature recently passed legislation (called Greyson's Law) that requires rides attached to a utility line to be certified compliant with the National Electrical Code. OHIO REV. CODE ANN. § 1711.531(A)–(B) (West 2006); John Arthur Hutchison, *Greyson's Law Now in Effect*, NEWS-HERALD (Cleveland), July 1, 2005, *available at* http://www.news-herald.com (follow "Advanced Search" hyperlink, enter "Greyson's Law" in "Headline" field and "2005" in "Article from" field, and search). As discussed *infra*, a legislative fix is one approach to such a situation, but one unlikely to occur in the absence of the extensive publicity involved here.

[32] *See* sources cited *supra* notes 1–2.

General deterrence underlies a dominant view of the purposes of tort law, based on and growing out of the extensive "law-and-economics" scholarship.[33] While certainly not the exclusive rationale, an important assumption of many participants in and observers of tort law is the fundamentally economic idea that potential liability affects conduct, specifically because individuals will avoid economically inefficient conduct.[34] In short, we avoid conduct that will cost us money. Although such incentives are typically classified as "general deterrence," surely the specific deterrence constitutes a subset of the general—especially for repeat players. A car manufacturer who is found liable in tort for compensatory damages for a specific design decision will (at least in theory) have its future decisions affected.

Beyond compensatory damages, punitive damages are frequently considered to have a specific deterrence component.[35] Thus, punitive damages are appropriate because, in large part, they will deter not just others from acting badly, but also the *particular* defendant from acting badly again.[36]

As an additional incentive to "fix" tortious conduct, evidentiary rules typically exclude evidence of subsequent remedial measures.[37]

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[33] *See* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1828–33 (1997). One can think of deterrence theory (in both the criminal and tort law contexts) as secondary to an incapacitation theory—once the expenses of compliance with either criminal or tort standards make the conduct unprofitable, actors either choose to stop or are forced to stop via tort judgments or criminal liability. For the most part, my analysis herein tracks under either theory.

[34] *See id.* at 1831. A common explication of the standard of care in negligence law is the classic Learned Hand formula. *E.g.*, David G. Owen, *Toward a Proper Test for Design Defectiveness: "Micro-Balancing" Costs and Benefits*, 75 TEX. L. REV. 1661, 1680 (1997). While that formula is intended to reflect *overall* costs and benefits, it is frequently observed that individual actors will make decisions based on their *individual* costs and benefits. *See id.* at 1680 n.61. In other words, they will ignore societal costs that they are unlikely to bear. It is the individual economically rational approach on which I focus.

[35] *E.g.*, Green Oil Co. v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989) (describing punitive damages as "deter[ring] the wrongdoer and others from committing similar wrongs in the future"); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998) (exploring the economic implications of punitive damages); *see also* Schwartz, *supra* note 33, at 1831–32 (arguing that deterrence's economic components also contain a substantial "justice" component, but that such components are not incompatible).

[36] *Green Oil Co.*, 539 So. 2d at 222.

[37] *E.g.*, FED. R. EVID. 407.

Consequently, when a party merely stands accused of acting negligently, it can immediately take steps to avoid a recurrence of the harm without fear of that action being held up as evidence of past negligence. In the classic situation, if a storekeeper is sued in a slip-and-fall case, the storekeeper can install non-slip material in the area in question without being found to have implicitly admitted to negligence in failing to have it there before. The law seeks to create incentives to prevent individual actors from acting negligently in the same way again.

As for the effect of criminal prosecution, both specific and general deterrence components of criminal liability are well-accepted, both by courts and commentators. Criminal punishment (in particular imprisonment) serves "retributive, educational, *deterrent*, and incapacitative goals."[38]

Specific deterrent effects are considered particularly effective and pronounced in institutional settings. In discussing prosecutions of corporations, for example, Deputy Attorney General Larry D. Thompson wrote:

> Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish . . . crime. . . . [A] corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees.[39]

Specific deterrence in prosecuting corporations would presumably apply equally in the context of prosecuting members of a governmental

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[38] Mistretta v. United States, 488 U.S. 361, 367 (1989) (emphasis added) (citing 18 U.S.C. § 3553(a)(2) (2000)); *accord* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 89 (2004) ("Traditionally, criminal law has focused on deterring, incapacitating, rehabilitating, and inflicting retribution on individual defendants."). Professors Bibas and Bierschbach also describe a classic approach to deterrence as suggesting that "[t]o the extent that the expected penalty for committing a crime outweighs the expected benefit, a potential wrongdoer will be deterred." Bibas & Bierschbach, *supra*, at 105–06.

[39] Memorandum from Larry D. Thompson, Deputy Attorney Gen., U.S. Dep't of Justice, to the Heads of Dep't Components (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

regulatory agency, other things being comparable.[40] When discussing an agency with fewer than ten inspectors, the criminal prosecution of one of the inspectors could be assumed to result in changes in behavior to avoid the problem reoccurring. So, one would expect the criminal prosecution of ODA employees to result in other employees (including higher-up regulators) acting with additional care in connection with (at least) electrical matters—whether through more cautious inspections or through more thorough training.

Thus, both criminal and tort law are generally accepted as having a role in changing the specific conduct of the individuals whom or entities that are sued or prosecuted. In this case, the prosecution of ODA employees and the expected suits against the employees and the ODA itself would, one could reasonably expect, result in the enhancement of the inspection process as it relates to electrical matters. That expectation, however, was not realized here, for at least three reasons.

III. WHY WAS THE ODA'S RESPONSE DIFFERENT?

The traditional notions of incentives in this case did not result in the behavior that one would ordinarily expect. The contrary response—loosening regulations rather than tightening them—occurred, I submit, for at least three reasons.

First, the ODA, like many regulatory agencies, creates its own guidelines.[41] The legislature gave the ODA general direction to inspect amusement rides in the state of Ohio, but left discretion with the ODA to determine what those inspections will include.[42] Thus, the ODA has the ability to modify what its inspectors are required to do—to modify the definition of what is needed for "safe operation" of amusement rides. Shifting the responsibility for grounding to the ride owners is presumably

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[40] Of course, all other things are not typically equal—in particular, governmental agencies frequently enjoy immunity from civil suits. Sovereign immunity is discussed *infra*.

[41] *Cf.* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 10–11 (1990) (discussing the evolution of the National Highway Traffic Safety Administration's (NHTSA) approach to automobile regulation and noting the lack of specific direction provided by Congress and the ultimate focus on recalls rather than prospective regulation).

[42] OHIO REV. CODE ANN. § 1711.53(B) (West Supp. 2005) (directing the director of agriculture to adopt rules "for the safe operation and inspection of all amusement rides" that are "reasonable and based upon generally accepted engineering standards and practices"). Of note, the statute authorizes, but does not require, the adoption of rules by reference to, among other things, the national electrical code. *Id.*

within the scope, even if perhaps not within the spirit, of the legislative allocation of responsibility.[43]

This discretion to define the standard of conduct is important for a variety of reasons. Most notably, it matters because the inspectors pled guilty to a misdemeanor entitled "dereliction of duty,"[44] and the various homicide charges that they initially faced all relied upon that underlying charge.[45] That misdemeanor makes criminal only that conduct that is contrary to "a duty expressly imposed by law."[46] Because the ODA can change what duties are expressly imposed by law, by changing its regulations, it can also prospectively modify what conduct by its inspectors will be criminal under the dereliction of duty statute. In other words, the

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[43] *But see supra* note 42.

[44] § 2921.44(E) ("No public servant shall recklessly fail to perform a duty expressly imposed by law with respect to [his] office, or recklessly do any act expressly forbidden by law with respect to [his] office."). This provision was added to Ohio law in 1974. § 2921.44. Previously, state officials could be prosecuted for dereliction of duty based on misappropriation of funds, but only county and local government officials faced a general prohibition against recklessly failing to act as required by statute. OHIO REV. CODE ANN. § 2921.44 note (West 1997) (Commentary). The Ohio courts have strictly applied the requirement that a dereliction of duty charge be based on an express duty set out in the statutory or administrative law. *See* State v. Gaul, 691 N.E.2d 760, 768, 771 (Ohio Ct. App. 1997) (reversing a conviction for dereliction of duty because the fiduciary duty owed by a state treasurer to the state was only implied in the statutory grant of authority). Additionally, the courts have ruled that a general description of a duty cannot be the basis of a criminal prosecution for dereliction of duty. *See* State v. Livesay, 698 N.E.2d 522, 524 (Ohio Ct. Com. Pl. 1998) (reversing the dereliction of duty conviction of a state vehicle inspector who did not adequately inspect vehicles because the applicable administrative regulations were "not so specific as to create criminal liability for failure to perform in accord with [them]"). A survey of instances when a party was convicted under section 2921.44 found a small but varied group of cases. No single type of offense dominated, and the cases ranged from failure of a police officer to stop a crime in which the officer was involved to the failure of municipal officials to get competitive bids. *See, e.g.*, State v. Freeman, 485 N.E.2d 1043 (Ohio 1985) (upholding conviction of defendant for failing to obtain competitive bids); City of Cleveland v. Fischbach, Cuyahoga App. No. 84944, 2005-Ohio-3164, 2005 Ohio App. LEXIS 2946 (reversing conviction of officer who failed to stop a fight in which he was involved); State v. Johnson, Nos. C-990482 C-990483, 2000 Ohio App. LEXIS 5321 (Ohio Ct. App. Nov. 17, 2000) (affirming conviction of officer for failing to stop herself from misusing coupons).

[45] *See* Indictment-Four Counts, State v. Turner, No. 04 CR 000025 (Ohio Ct. Com. Pl. Lake County Nov. 4, 2004); Indictment-Four Counts, State v. Brubaker, No. 04 CR 000026 (Ohio Ct. Com. Pl. Lake County Oct. 15, 2004).

[46] § 2921.44(E).

ODA's modification of the form also modified at least one standard of criminal liability for its inspectors—the standard on which the inspectors' prosecutions in this case all were based.

By changing that standard, the ODA also changed the availability of the doctrine of negligence per se in a civil suit against it or its employees.[47] If the inspector has not violated a duty imposed by law, he or she has not acted criminally (at least under the statute used in this case). If the inspector has not acted criminally, a civil suit cannot rely on that statutory violation to prove negligence per se. In the context of this case, if an inspector in the future ignores grounding problems with a ride, a plaintiff *may* still be able to prove negligence (and a prosecutor *may* be able to prove dereliction of duty), but it will be a harder case to make, especially given the explicit and publicly announced decision by the ODA that its inspectors have no responsibilities concerning grounding.[48]

Second, the ODA exists in a state government with budgetary challenges[49] and is presumably aware of the potential for substantial civil liability for such conduct.[50] While liability might occur for conduct such

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[47] *See* Gressman v. McClain, 533 N.E.2d 732, 735 (Ohio 1988) ("It is well-settled that where a legislative enactment imposes a specific duty for the protection of others, a person's failure to observe that duty constitutes negligence *per se*."). Sovereign immunity, of course, affects the potential for civil liability; under Ohio law, state officers are immune unless the "officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner." OHIO REV. CODE ANN. § 9.86 (West 2001). Given the evidence, and given the guilty pleas and convictions, the individual actors here would potentially face individual exposure for which the state would presumably face vicarious liability.

[48] *See supra* text accompanying notes 27–28.

[49] *See* Margo Rutledge Kissell, *The Fight for Funds*, DAYTON DAILY NEWS, Sept. 7, 2003, at A1 (describing Ohio's budget crisis as having been called "the worst state budget crisis in 50 years").

[50] Civil judgments presumably would not come directly out of the ODA's budget, but a substantial verdict would also presumably be noted in future evaluation of the agency in performance reviews and so on. The ODA's ride inspection program is funded in part by ride inspection fees ranging from $100 annually for "kiddie" rides to $950 annually for roller coasters, as well as annual $70 licensing fees. *See* OHIO REV. CODE ANN. §§ 1711.11(C), 1711.53(E)(1) (West Supp. 2005). The ODA does not appear to make publicly accessible how much money is generated through these fees, but estimates based on numbers of rides suggests that the funding totals no more than several hundred thousand dollars. A smaller amount of money comes from fines imposed during inspections. In 2003, fines totaled $39,600. Press Release, Ohio Dep't of Agric., Ohio Amusement Ride

(*continued*)

as that of the inspectors in this case, even without the ODA's form revisions, surely plaintiffs' cases are stronger with the doctrine of negligence per se (and the opportunity to point to the inspectors' "no contest" pleas) than it would be without it.

Additionally, the recruitment and retention of ride inspectors may well be impacted by high-profile prosecutions of or lawsuits against past inspectors; the manner in which the ODA responds to such suits may affect its ability to successfully hire and keep inspectors—again in the context of tight budgets. To provide some context, in 2003, the ODA had eight inspectors employed to monitor Ohio's 2,208 licensed amusement rides; in 2004, that number dropped to five.[51] One inspector quit, and two only inspected fair games while under prosecution for the Yoe death.[52]

Lastly, regulators, including those at the ODA, do their jobs in a local and national environment in which elected officials and candidates urge that government be run "more like a business,"[53] or more like "a rational profit-maximizing enterprise."[54] While what a "profit-maximizing enterprise" might mean in a regulatory agency context is hard to identify precisely,[55] it almost certainly would mean avoiding exposure to substantial verdicts and evaluating decisions in economic terms, possibly

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Safety: Highlights of ODA's Consumer Safety Tips and Ride Inspection Program (Jan. 16, 2004), http://www.ohioagriculture.gov/pubs/divs/amus/curr/amus-fs-ridesafety-011604.stm. These fees are set by the legislature, and so the ODA cannot create the funding for more comprehensive inspections on its own.

[51] Associated Press, *Carnival Ride Inspectors Try for Safety at State Fair*, AKRON BEACON J., Aug. 2, 2004, at B8.

[52] *Id.*

[53] *See, e.g.*, Donnie Fetter, *Legislators Tout Achievements of Latest Session*, AUGUSTA CHRON., Apr. 20, 2005, at 6B, *available at* http://chronicle.augusta.com/stories/042005/met_3942349.shtml (quoting a Georgia legislator as saying that Georgia government is being operated "more like a business"); Editorial, *Taking Stock of the Reds*, CINCINNATI POST, Mar. 12, 2005, at 10A, *available at* http://www.cincypost.com/2005/03/12/edita031205.html (reporting that a county commissioner in Ohio urged that *government* operate like a business). A Westlaw search for "like a business" in the same sentence as "government" or "agency" in the last two years returned 514 documents in the ALLNEWS database.

[54] Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972).

[55] There is no direct analogue to profit in a regulatory context. Success for a regulatory agency could be found in a number of ways: a general comparison of performance to a mission statement, quantity of or success in enforcement actions, "customer" surveys, and so on. But if one focuses on operating "like a business," one would assume that the focus would be in spending funds efficiently and avoiding unnecessary or avoidable expenditures.

to the exclusion of considering the spirit of the agency's legislative mandate.

In that context, it is no surprise that the rules were rewritten to decrease the future likelihood of liability. If a widget maker could eliminate all regulations relating to widget safety specifications, it would rationally do so, even if it had every intention to comply with those specifications.[56] Such a manufacturer would no doubt be pleased to avoid the potential imposition of negligence per se if in the future it failed to comply with regulations, inadvertently or not. If it could expressly shift liability for widget failure to widget retailers or purchasers, it would naturally do so as well.[57]

The differences between the public and private realms are critical here and may point to problems with the common practice of advocating that governmental entities act like businesses. When a private actor changes its behavior to avoid liability risks, those changes may be deemed to be a net negative—consider, for example, the arguments made urging the passage of the recently enacted federal law[58] granting immunity to gun manufacturers from products liability lawsuits, some of which are premised on the idea that there is a social good in having firearms available.[59] Notwithstanding this legislation, in the private business context, one would expect the market to demand some number of those products even if the price was higher due to the absence of the immunity, whether from an existing manufacturer or a new one.[60] In the public realm,

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[56] Basic concepts of negligence or products liability militate in favor of the manufacturer acting reasonably regardless of regulations, of course. But a manufacturer would like to have the flexibility to argue that any conduct is non-negligent and avoid being shown to have violated a regulatory requirement.

[57] I do not necessarily suggest that the ODA is "pleased" to have acted as it has, notwithstanding its public statements of comfort. *See* Press Release, Ohio Dep't of Agric., Agriculture Director Announces New Ride Safety Law (June 30, 2005), *available at* http://www.ohioagriculture.gov/rides/curr/news/ars-nr-newridelaw-063005.stm. Possibly, the ODA fully appreciates (and regrets?) the potential effects of its abandonment of electrical grounding evaluation and understands that those effects run counter to at least one interpretation of the legislative intent. But the incentives have combined to at least encourage if not mandate such a response.

[58] Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, §§ 1–4, 119 Stat. 2095, 2095–99 (2005) (codified at 15 U.S.C.A. §§ 7901–7903 (Supp. 2006)).

[59] *See, e.g.*, 151 CONG. REC. S1529 (daily ed. Feb. 16, 2005) (statement of Sen. Craig).

[60] *Cf.* Josh Goldstein, *Insurance Brokers Surprised: Company Finds Coverage Still Available for IUDs*, J. COM., Nov. 25, 1987, at 9A (noting a new company's intention of reintroducing the IUD after the Dalkon Shield withdrawal).

no manufacturers are being "priced out of the market." Rather, in the public setting, the (regulatory) agency is concluding that it has been priced out of the market—the market being for safety itself. Unlike the private actors, in which another company can step up to provide the desired product, there is no competition for regulating rides or other activities that legislators have concluded need regulation.

The ODA's decision here fits within that framework. Even if enhancing the electrical inspection process might be what a regulator would do if considering *only* the mandate to promulgate regulations that would achieve safety, the legislative mandate is not the only factor being considered by the ODA. Instead, the ODA arguably has acted precisely as one would predict it should if it is being run "like a business." It is avoiding economic risk, and, indeed, shifting that risk to other entities that lack the statutory authority to shirk it.[61]

IV. THE IMPLICATIONS

The ODA's situation is far from unique. The ever-more regulatory-based government is premised on the delegation of broad powers and responsibilities to agencies, which then promulgate their own regulations to exercise the powers and achieve the responsibilities.[62] When those agencies' motivations are considered in the abstract, such an approach is sound. But the power to set one's own rules can pervert the actor's incentives, especially in the context of budget pressures and focus to reduce or eliminate avoidable expenditures. When faced with those forces, it should come as no surprise that a government agency would do what it could to shift or avoid responsibility, even when the party to whom the

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[61] Of course, the ride owners at least share final responsibility for the safety of their rides (at least from a tort law perspective), *see supra* note 31 and accompanying text, and so the ODA's form requiring the owners to acknowledge that responsibility is likely immaterial. What is more interesting is the ODA's implicit declaration that, with electrical safety being the owners' responsibility, it is necessarily *not* the ODA's.

[62] *But see* MASHAW & HARFST, *supra* note 41, at 70. As was observed in the evolution of the NHTSA, a regulatory approach is only as effective as the combination of legislation, judicial decisionmaking, and the regulatory staff. *See id.* at 228. Providing broad safety mandates does not necessarily—or even often—result in improved safety. *See id.* at 70. Without a specific direction—and with the possibility of judicial challenges to new regulations—an agency may take the path of least resistance, especially when funding is limited. In NHTSA's case, that meant moving away from specific technical rulemaking and toward recalls, despite an absence of evidence that recalls, in fact, improved the safety of vehicles more than negligibly. *See id.* at 149.

responsibility is being shifted is not the best situated to perform the responsibility, or when that party has its own conflicts of interests.

One might point to the Ohio legislative response—requiring certification of compliance with the National Electrical Code, among other things[63]—as solving the problem. While the legislation may avoid a future electrocution (and I applaud its passage), the Yoe situation is undoubtedly atypical in the level of publicity it received. If the ODA's decision to eliminate the grounding checks from its inspection forms had been made in the face of a less-public lawsuit or prosecution, a legislative response would be far less likely.

Even more troubling, consider the rational regulator who is aware that the agency's employees are doing a bad job in one part of their duties and changes the regulation to preempt future litigation rather than fixing the employees' conduct. Suppose, for instance, that the ODA had realized when creating the forms that its inspectors knew little about electrical matters and lacked the necessary equipment to check things like grounding, and realized further that these failings were likely to result in a catastrophic outcome and litigation and therefore, never put the electrical items on the form in the first place. While Greyson Yoe's death would have gotten press and surely resulted in some litigation, it is far less clear that the ODA's actions would have been as central. The previously mentioned widget maker[64] would rewrite (or eliminate) widget regulations before it violated them if it had the power to do so. So too, I contend, might a regulator reduce the burden on the agency to avoid future civil or criminal liability. These decisions are largely invisible, and so we cannot rely upon a legislative response to reverse them.

Rather than a reactive legislative response, another legislative solution would be increased guidance to the agency in the first place. As noted earlier, the ODA—like many regulatory agencies—is given a very broad mandate.[65] There are literally thousands of possible items involved with ride safety (as with building safety, car safety, or many other regulated industries), and so by practical necessity, not everything can or will be checked. The agencies must prioritize, and their prioritizations may run counter to the legislature's (unstated) preferences—here, by shifting the electrical safety obligation to the owner alone. This shift may in fact be quite rational; because electrical problems are so likely to cause severe injuries or death, ordinary economic incentives may make it most likely

[63] *Supra* note 31.

[64] *See supra* text accompanying notes 56–57.

[65] *See supra* note 42 and accompanying text.

that the ride owner will avoid those injuries while lower-cost injuries are best addressed by regulators. However, in a relatively under-capitalized industry where any significant judgment will shut down a company, these assumptions may not be well-founded.[66]

The amusement ride industry (especially the portable ride industry) may be a particularly good example of a situation where economic incentives may not be enough to ensure that the industry participants act appropriately. Recall that the ride owner settled for his insurance limits of $1 million[67] (which just met the requirement that ride operators provide the state with a certificate of insurance demonstrating coverage of $500,000 per person and $1,000,000 per occurrence).[68] One might expect that more than that amount would be pursued if assets were available to cover further. Additionally, much of the amusement industry (in particular the portable ride industry) carried a large amount of debt, with rides financed by a small number of lenders that specialize in such loans, at least sometimes affiliated with insurance carriers that specialize in covering carnivals.[69] These lenders permit payments on the equipment loans only during the operating season, and their affiliated insurers provide relatively inexpensive no-deductible policies, suggesting that the carnival owners are "cash-strapped."[70]

Accordingly, the legislature could anticipate a situation in which the regulatory agency lacked sufficient detail in its mission in advance and, in adopting the legislation that created jurisdiction, provide a somewhat more comprehensive mandate to the agency. If the legislature wanted to ensure that ride inspections included a determination of the wiring's compliance with the code, for example, it could be included in the first place.

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[66] The ODA's decision may reflect what some might predict—the capture of the regulator by the major players in the industry (with substantially larger budgets and other resources). In this context, the major players, at least in terms of concentrated capital, are the fixed-site amusement park chains (Six Flags, Paramount, Disney, Universal, Cedar Point, etc.) and a small number of major carnival operators. Neither group is likely to be in the running for operating rides at a fair like the Lake County Fair. I have not seen any indication that amusement ride regulation (which is primarily a state activity), whether in Ohio or elsewhere, has in fact been captured by any segment of the industry, but neither can I exclude it as a possibility.

[67] Martin, *supra* note 5.

[68] OHIO REV. CODE ANN. § 1711.54 (West 2003).

[69] *See* Shaun Sutner, *Spin Control*, SUNDAY TELEGRAM (Worcester, Mass.), Nov. 21, 2004, at A1, *available at* http://worcestervoice.com/state_takes_exception_to_sizzler_comments.htm.

[70] *Id.*

Another potential approach to such situations is to strengthen sovereign immunity. If the state faces no liability exposure for anything but the most irresponsible actions, the litigation implications of its decisions will be less of a factor. Here, for example, the ODA could have concluded that it was unable to do a perfect job of ensuring electrical safety, but that it could do a better job. With that conclusion, it could have provided additional training and equipment and felt confident that, even if safety was not ensured, at least the state faced no liability. Because Ohio potentially faced financial exposure here, however, the state is encouraged to consider litigation implications more than perhaps should be desired. Of course, in this situation, the ODA still faces the prospect of its employees being held criminally liable, but it would at least change some of the balance of incentives.

CONCLUSION

When criminal charges or civil suits are filed, we expect conduct to be changed. Most of the time, that expectation is achieved, at least partially. But we should be cautious in those assumptions when the defendants in those suits (or their employers) write their own rules and are urged to run themselves like businesses. When those incentives intersect, we may be disappointed to find that, indeed, government agencies will act like a business and write themselves out of future liability—making the harm that triggered the suits, whether it be the tragic death of a young boy or any other avoidable bad result, more rather than less likely.